

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE P. RUIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. C97-5762RJB
CR95-5851RJB

ORDER DENYING A
CERTIFICATE OF
APPEALABILITY

This matter comes before the court on petitioner's notice of appeal (CR95-5851RJB, Dkt. 181). The court must determine whether to grant a Certificate of Appealability. The court has reviewed the record in both the criminal and civil cases.

1. History of Criminal Conviction

In an order dated February 9, 2000, United States District Judge Jack E. Tanner set forth the history of petitioner's conviction and sentence, as follows:

Ruiz was tried twice on charges of conspiracy to distribute, distribution, and possession with intent to distribute cocaine. His first trial resulted in a mistrial when the jury declared that it was hopelessly deadlocked. The second trial resulted in a conviction. Ruiz was initially sentenced to 210 months in custody. After a successful appeal, he was resentenced to 168 months in custody. C97-5762RJB, Dkt. 29, at 1.

2. Proceedings and Motions in Criminal Case No. CR 95-5851RJB

On March 7, 2005, petitioner filed a Motion for Writ of Audita Querela. CR95-5851RJB, Dkt. 166. That motion was filed in the criminal case, and was not assigned a separate civil case number. On August 9, 2005, Judge Tanner dismissed the motion, finding as follows:

1 Defendant seeks resentencing by way of a Writ of *Audita Querela* based upon United States v.
2 Booker, 125 S.Ct. 738 (2005). The Defendant's sentence became final prior to the Booker
3 decision. Booker does not apply retroactively to cases that became final prior to January 12, 2005.
4 Guzman v. United States, 2005 WL 803214.

5 CR95-5851RJB, Dkt. 170, at 1-2. On August 22, 2005, petitioner appealed the August 9, 2005 order.
6 CR95-5851RJB, Dkt. 171. The appeal of the August 9, 2005 order, although docketed in the criminal
7 case, was a civil motion seeking postconviction relief. The appeal is therefore properly characterized as a
8 civil appeal. On March 2, 2006, the Ninth Circuit issued an order, concluding that the motion for writ of
9 audita querela was an attack on petitioner's conviction, and was therefore a second or successive motion
10 subject to the requirements of 28 U.S.C. § 2255; and denied the application to file a second or successive
11 motion. CR95-5851RJB, Dkt. 196.

12 **3. Proceedings and Motions in Civil Case No. C97-5762RJB**

13 On December 26, 1997, petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside or
14 correct his sentence. C97-5762RJB, Dkt. 1. On February 9, 2000, United States District Judge Jack E.
15 Tanner issued an order denying petitioner's motion under 28 U.S.C. § 2255. C97-5762RJB, Dkt. 29.
16 Petitioner appealed the February 9, 2000 order, and on May 13, 2002, the Ninth Circuit U.S. Court of
17 Appeals affirmed the district court judgment. C97-5762RJB, Dkt. 34. Petitioner filed a document with the
18 Ninth Circuit, captioned Application for Relief FRAP 27(a)(1). See C97-5762RJB, Dkt. 35. The Ninth
19 Circuit considered this an application for authorization to file a motion under 28 U.S.C. § 2255, and denied
20 the application. *Id.*

21 On July 20, 2005, petitioner filed a document captioned Motion for Relief from Judgment or Order
22 Pursuant to FRCivP Rule 60(b)(5) & (6). C97-5762RJB, Dkt. 36. On September 30, 2005, Judge Tanner
23 issued an order interpreting this motion as a Motion for Reconsideration, construing the motion as a
24 second or successive motion under 28 U.S.C. § 2255, and dismissing the motion for want of jurisdiction.
25 C97-5762RJB, Dkt. 37. On October 11, 2005, the order dismissing petitioner's motion for relief from
26 judgment was returned as undeliverable to the Clerk's office by the U.S. Post Office. C97-5762RJB, Dkt.
27 38.

28 On November 25, 2005, petitioner filed an appeal of Judge Tanner's September 30, 2005 order in
the civil case, C97-5762RJB, Dkt. 37. The appeal was docketed in the criminal case, so there was some
confusion as to the record. See CR95-5851RJB, Dkt. 181. This appeal is a civil appeal of Judge Tanner's

1 September 30, 2005 order, C97-5762RJB, Dkt. 37. Before this court is the issue of whether to grant
2 petitioner a Certificate of Appealability in his appeal (CR95-5851RJB, Dkt. 181) of the September 30,
3 2005 order in C97-5762RJB, Dkt. 37. This order denying a Certificate of Appealability will be docketed in
4 both C97-5762RJB and CR95-5851RJB.

5 **4. Legal Standard**

6 The district court should grant an application for a Certificate of Appealability only if the petitioner
7 makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). To obtain a
8 Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that
9 reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different
10 manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
11 *McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).
12 When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason
13 would find it debatable whether the petition states a valid claim of the denial of a constitutional right and
14 that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
15 *Slack v. McDaniel*, 120 S.Ct. at 1604.

16 **5. Discussion**

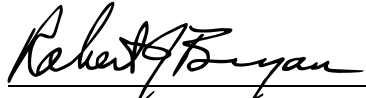
17 Judge Tanner construed petitioner’s Motion for Relief from Judgment or Order Pursuant to
18 FRCivP Rule 60(b)(5) & (6) (97-5762RJB, Dkt. 36) as a second or successive motion under 28 U.S.C. §
19 2255, and dismissed the motion for want of jurisdiction. See C97-5762RJB, Dkt. 37. There is nothing in
20 the record that would support a conclusion that jurists of reason would find it debatable whether the
21 petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it
22 debatable whether this court was correct in its procedural ruling. The motion for a Certificate of
23 Appealability should be denied. Nothing in this order, however, prohibits petitioner from filing with the
24 Ninth Circuit a motion pursuant to 28 U.S.C. § 2255, requesting authorization from the Ninth Circuit to
25 file a second or successive motion under Section 2255.

1 Therefore, it is hereby

2 **ORDERED** that a Certificate of Appealability on petitioner's appeal (CR95-5851RJB, Dkt. 181)
3 of the September 30, 2005 order in C97-5762RJB is **DENIED**.

4 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any
5 party appearing *pro se* at said party's last known address.

6 DATED this 14th day of March, 2006.

7 
8 Robert J. Bryan
9 United States District Judge